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10 Attorneys for Plaintiffs
11 THE DUFFY 2004 LLC
12 and THE TULL 2006 LLC

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 THE DUFFY 2004 LLC and THE
16 TULL 2006 LLC,

17 Plaintiffs,

18 v.

19 AXA EQUITABLE LIFE
20 INSURANCE COMPANY,

21 Defendant.

Case No. 2:17-cv-00996-DSF-RAO

FIRST AMENDED COMPLAINT

1. **BREACH OF CONTRACT;**
2. **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (CONTRACTUAL);**
3. **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (TORTIOUS); AND**
4. **DECLARATORY RELIEF**

JURY TRIAL DEMANDED

1 Plaintiffs, the Duffy 2005 LLC (“Duffy”) and the Tull 2006 LLC (“Tull,”
 2 and together with Duffy, the “Plaintiffs”), by and through their attorneys, file this
 3 complaint against Defendant AXA Equitable Life Insurance Company (“AXA” or
 4 “Defendant”), and alleges as follows:

5 **NATURE OF THE ACTION**

6 1. Plaintiffs bring this action seeking compensatory and punitive
 7 damages, equitable relief, and attorneys’ fees based on AXA’s unlawful increasing
 8 of the cost of insurance (sometimes referred to herein as “COI”) rates on a targeted
 9 group of its in-force Athena Universal Life II (“AUL II”) insurance policies (the
 10 “AUL II Policies”). This targeted group (the “Discriminated Group”), which
 11 includes Plaintiffs, consists of policyholders who own AUL II policies that (a) were
 12 issued on insureds who were 70 years old or older (issue age); and (b) have a face
 13 amount of \$1,000,000 or more. By raising cost of insurance rates without a proper
 14 basis and only on the Discriminated Group, AXA has breached the express and
 15 implied terms of the AUL II Policies.

16 2. The claims made by Plaintiffs here are virtually identical to the claim
 17 made by another plaintiff before this court and the action, EFG Bank AG v. AXA
 18 Equitable Life Insurance Company, 2:16-CV-08103 (DSF). The claims by
 19 Plaintiffs herein, as well as EFG Bank there, are based on the same COI increase
 20 and premised on the same breach of contract and violation of law.

21 3. The AUL II Policies are universal life insurance policies. Universal
 22 life insurance is a form of life insurance also known as “flexible premium”
 23 adjustable life insurance. Universal life insurance consists of two distinct
 24 components: (1) the life insurance component, for which the insurance company
 25 charges a cost to cover the risk of the insured’s death (the cost of insurance); and
 26 (2) a savings component, where premiums paid in excess of the cost of insurance
 27 (and certain other policy changes) accumulate and earn interest at a rate that will
 28 not be lower than a guaranteed minimum crediting rate.

1 4. Universal life insurance is designed to give policyholders flexibility,
2 particularly with respect to the payment of premiums. This can be demonstrated by
3 comparing universal life insurance to whole life insurance. With whole life
4 insurance, a policyholder pays fixed monthly premium payments for the life of a
5 policy. These fixed monthly premium payments include an amount associated with
6 the cost of actual insurance (i.e., the cost for the insurance company to bear the risk
7 of the insured's death) but also an additional amount intended to build up a "cash
8 value" that earns interest over time. In the insured's earlier years, the fixed monthly
9 premium payments are typically far higher than the insured's actual risk of death,
10 and most of the premiums are used to accumulate cash value that will be used to
11 fund the death benefit in the later years of the insured's life, when the fixed
12 monthly premiums are likely to be lower than the actual risk of death. That is, the
13 "cash value" build-up in the earlier years operates as a "reserve" to pay the death
14 benefit in the later years.

15 5. Universal life insurance "unbundles" these two components of a whole
16 life insurance policy and allows policyholders to choose whether to pay just enough
17 premiums to cover the risk of death (i.e., pay solely for the life insurance) or pay
18 more (subject to certain limitations) and build up a cash value that earns tax-
19 deferred interest (which, among other things, can be used to pay for the cost of
20 insurance in the future).

21 6. Although there is no fixed monthly premium payment that is due, if
22 the balance in the policy account is insufficient to cover the policy's monthly
23 charges, which includes the cost of insurance and certain other policy charges, the
24 policy will enter a grace period and lapse unless additional premiums are paid.

25 7. Universal life insurance policies have both guaranteed and non-
26 guaranteed elements. Guaranteed elements are fixed and determined at a specific
27 time, such as when the policy was issued. Non-guaranteed elements, on the other
28 hand, are not fixed at a specific time and can be adjusted by the life insurance

1 company under the terms of the policy. An example of a guaranteed element is the
 2 guaranteed minimum crediting rate. An example of a non-guaranteed element is the
 3 cost of insurance rate, which is the rate that AXA charges to bear the risk of the
 4 insured's death. (Many universal life insurance policies refer to this as the "cost of
 5 insurance" rate because it is the rate that the insurance company charges purely for
 6 insurance coverage.)

7 8. Although the AUL II Policies permit AXA to adjust the cost of
 8 insurance rates (by increasing or decreasing them), the AUL II Policies restrict
 9 AXA's ability to do so in at least three important ways. First, AXA may only
 10 change cost of insurance rates based on "reasonable assumptions as to expenses,
 11 mortality, policy and contract claims, taxes, investment income, and lapses."
 12 Second, any change in cost of insurance rates must "be on a basis that is equitable
 13 to all policyholders of a given class." Third, any change by AXA in the cost of
 14 insurance rates cannot "result in an interest crediting rate that is lower than that
 15 guaranteed in the policy."

16 9. The most important assumption in life insurance is mortality. Yet it is
 17 well-known in the life insurance industry that since AXA began issuing the AUL II
 18 Policies several years ago, in 2004, mortality has *improved*, not *worsened*. Indeed,
 19 in 2015, the same year AXA announced it would be raising the cost of insurance
 20 rates, the National Center for Health Statistics reported that mortality had improved
 21 by 16.6% between 2000 and 2014.¹ The improvement in mortality has resulted in
 22 new life insurance mortality tables that would, if anything, support a *decrease*, not
 23 increase, in cost of insurance rates. Despite this, AXA has *increased* cost of
 24 insurance rates, and it has done so by as much as 68%, in blatant breach of the AUL
 25 II Policies' express and implied terms and conditions.

26
 27
 28 ¹ Sherry L. Murphy, et al., *Mortality in the United States*, 2014, NCHS Data Brief No. 229, 5 (Dec. 2015).

1 14. AXA also has attempted to justify its rate increase by claiming that
2 low interest rates have resulted in lower than expected investment income for AXA.
3 But even if this were true, low interest rates would impact all AUL II Policies, not
4 just those with issue ages of 70 and above and face amounts of \$1,000,000 and
5 above, and there is no logical or actuarially-based reason for singling out these
6 policyholders for a rate increase. Furthermore, lower investment returns should not
7 justify a rate increase as high as 68%.

8 10. Furthermore, the AUL II Policies state that any change in cost of
9 insurance rates “will be on a basis that is equitable to all policyholders of a given
10 class.” But instead of implementing a rate increase that is equitable to policyholders
11 in each class, AXA identified a new group of policyholders to be the target of its
12 rate increase. That group is the Discriminated Group and consists solely of
13 policyholders who own policies with issue ages of 70 and above and face amounts
14 of \$1,000,000 and above. Although AXA now refers to this group as a “class,”
15 upon information and belief, this so-called “class” did not exist at the time AXA
16 designed the AUL II Policies and AXA only created it in a brazen attempt to
17 circumvent the AUL II Policies’ requirement that any rate increase be on a basis
18 that is equitable to all policyholders of a given glass. In other words, knowing it
19 could not treat policyholders within a class differently, AXA attempted to
20 accomplish this result by simply redefining the classes themselves.

21 11. Moreover, by drastically raising cost of insurance rates by as much as
22 68% on only the Discriminated Group, it is apparent that AXA seeks to force
23 Plaintiffs and other members of the Discriminated Group either to (a) pay
24 exorbitant premiums that AXA knows would no longer justify the ultimate death
25 benefits, or (b) lapse or surrender their AUL II Policies and forfeit the premiums
26 they have paid to date, thereby depriving policyholders of the benefits of their
27 policies. AXA, in turn, will make a huge profit—either through higher premium
28 payments or by eliminating a large group of policies (through lapses or surrenders)

1 and keeping the vast majority of the premiums that have been paid to date on them.
 2 Indeed, AXA stated in its Form 10-K filed with the Securities and Exchange
 3 Commission (“SEC”) that it expected its rate increase to result in a \$46 million
 4 increase to net earnings in 2015 alone. Later, however, AXA reported that it had
 5 realized this \$46 million increase in just the first nine months of 2015.

6 12. AXA’s misconduct, as described more fully herein, constitutes not
 7 only express breaches of the AUL II Policies, but also breaches of the implied and
 8 fair dealing and unlawful, unfair, and deceptive business practices. Plaintiffs
 9 therefore seek compensatory and punitive damages, as well as equitable relief and
 10 attorneys’ fees.

11 13. Indeed, in apparent response to complaints about AXA’s rate increase,
 12 NYDFS recently proposed a new regulation to protect policyholders “from
 13 unjustified life insurance premium increases.”² The regulation would give NYDFS
 14 the opportunity to review potential rate increases by requiring life insurance
 15 companies to notify NYDFS “at least 120 days prior to an adverse change in non-
 16 guaranteed elements of an in-force life insurance or annuity policy.”³ The
 17 regulation also would require insurers to notify policyholders “at least 60 days prior
 18 to an adverse change in non-guaranteed elements of an in-force life insurance or
 19 annuity policy.”⁴ In addition, the regulation would require insurers to “establish
 20 board-approved criteria for determining non-guaranteed charges or benefits” and
 21 would mandate a NYDFS review of “the anticipated experience factors and non-
 22 guaranteed elements for existing policies whenever the non-guaranteed elements on
 23 newly issued policies are changed.”⁵ The regulation defines experience factors as

24
 25 ² See Press Release, NYDFS, *DFS Proposes New Regulation to Protect New Yorkers from*
 26 *Unjustified Life Insurance Premium Increases* (Nov. 17, 2016),
<http://www.dfs.ny.gov/about/press/pr1611171.htm>.

27 ³ *Id.*

28 ⁴ *Id.*

⁵ Life Insurance & Annuity Non-Guaranteed Elements §48.2, 11 NYCRR 48 (proposed

1 “investment income, mortality, morbidity, persistency, or expense that represents
2 the insurer’s financial experience on a policy.”⁶ “Profit margin is not an experience
3 factor.”⁷

4 14. In announcing the proposed regulation in a press release dated
5 November 17, 2016, NYDFS Superintendent Maria Vullo declared that New York
6 “will not stand by and provide life insurers free reign to implement unjustified cost
7 of insurance increases on New Yorkers simply to boost profits.”⁸

8 15. An article in The Wall Street Journal published the same day notes that
9 although the regulation would apply only in New York, it “could be widely copied
10 by other insurance departments.”⁹

11 THE PARTIES

12 16. Each plaintiff is a limited liability corporation organized under the
13 laws of the State of Washington and the managing member of each is the same
14 entity, a separate Washington LLC with its principal place of business in California.
15 The policies currently owned by Plaintiffs were issued in the state of California to
16 policy owners who resided in California at the time of issue. All of the individual
17 members of both Plaintiffs, and of the LLC members, are residents of California or
18 Colorado.
19

20 17. Upon information and belief, Defendant AXA Equitable Life
21 Insurance Company is a New York corporation with its principal place of business
22 in New York, New York, and AXA is authorized to do business in the State of
23

24 Nov. 17, 2016), http://www.dfs.ny.gov/insurance/r_prop/rp210txt.pdf.

25 ⁶ *Id.*

26 ⁷ *Id.*

27 ⁸ Press Release, NYDFS, *supra* note 2.

28 ⁹ Leslie Scism, *New York Regulator Aims to Require Life Insurers Justify Higher Rates on Old Policies*, Wall St. J. (Nov. 17, 2016), <http://www.wsj.com/articles/new-york-regulator-aims-to-require-life-insurers-justify-higher-rates-on-old-policies-1479394201>.

1 California and regularly conducts its business in the State of California, including
2 within this judicial district.

3 **JURISDICTION AND VENUE**

4 18. This Court has subject matter jurisdiction under 28 U.S.C.
5 § 1332(a)(2) because the action involves parties of diverse citizenship, and because
6 the amount in controversy exceeds \$75,000, exclusive of interest and costs.

7 19. This Court has personal jurisdiction over AXA because AXA regularly
8 conducts and transacts business in this state, including having issued the life
9 insurance policies in this First Amended Complaint in this state.

10 20. Venue is proper pursuant to 28 U.S.C. §§ 1391(a)(1), (a)(2), and
11 1391(b) because AXA conducts business in this judicial district, and a substantial
12 part of the events giving rise to the claims occurred in this judicial district,
13 including AXA's issuance of the policies at issue in this First Amended Complaint.

14 **FACTUAL BACKGROUND**

15 **A. Plaintiffs Are the Owners of AUL II Policies Subject to AXA's** 16 **COI Increase**

17 21. Duffy is the owner and beneficiary of a \$3 million AUL II Policy
18 issued by AXA on February 4, 2005 and bearing policy number 154 231 577, a
19 copy of which is attached hereto as **Exhibit 1** (the "Duffy Policy").

20 22. Tull is the owner and beneficiary of a \$5 million AUL II Policy issued
21 by AXA on February 18, 2006 and bearing policy number 155 231 627, a copy of
22 which is attached hereto as **Exhibit 2** (the "Tull Policy," and together with the
23 Duffy Policy, the "Plaintiff Policies").

24 23. AXA issued and delivered the Plaintiff Policies in the State of
25 California, and they are subject to the cost of insurance rate increases.

26 24. As is typical of universal life insurance policies, the Plaintiff Policies
27 provide that they will remain in force as long as there are sufficient funds in the
28 policy account each month to cover the monthly deductions described in the

1 Policies. The monthly deductions consist of a premium charge, an administrative
 2 charge, and a cost of insurance charge, plus charges for any policy riders. Any
 3 balance in the policy account that is left after the deductions are taken reflects the
 4 “Policy Account Value,” which accrues interest at a rate that cannot be lower than
 5 the guaranteed minimum crediting rate of 3 percent for the Plaintiff Policies. If in
 6 any month there are insufficient funds in the account to cover the deductions, the
 7 policy will enter a grace period, which is 61 days for the Plaintiff Policies. If
 8 additional premiums are not paid within the grace period, AXA will terminate, or
 9 lapse, the Plaintiff Policies.

10 25. The largest and most significant charge under the AUL II Policies is
 11 the cost of insurance charge. This charge, also known as the mortality charge,
 12 reflects the price that AXA charges to cover the risk of death. The cost of insurance
 13 charge is determined by multiplying the cost of insurance rate times the net amount
 14 at risk. The net amount at risk is the death benefit minus the policy account value.
 15 The policy account value is deducted from the death benefit because, although the
 16 policy account value is part of the death benefit paid upon the insured’s death,
 17 policyholders do not pay cost of insurance on this policy account value, which is
 18 the savings component of the AUL II Policies and not the “insurance.”

19 26. The cost of insurance rates under a policy are based initially on certain
 20 characteristics of the insured, including her or his gender, age, and underwriting
 21 class (*i.e.*, preferred plus, preferred, standard, and substandard classes). The cost of
 22 insurance rate increases every year as the insured ages.

23 27. The Plaintiff Policies state that AXA “will determine cost of insurance
 24 rates from time to time” and that any change in the cost of insurance rates will be as
 25 described in the “Changes in Policy Cost Factors” provision. The “Changes in
 26 Policy Cost Factors” provision provides:

27 Changes in policy cost factors (interest rates we credit,
 28 cost of insurance deductions and expense charges) will be

1 on a basis that is equitable to all policyholders of a given
 2 class, and will be determined based on reasonable
 3 assumptions as to expenses, mortality, policy and contract
 4 claims, taxes, investment income, and lapses.

5 28. The Plaintiff Policies also contain a promise to pay interest on the
 6 policy account value. Although AXA sets the rate of interest, the rate can never be
 7 lower than the guaranteed minimum credit rate, which is 3 percent for the Plaintiff
 8 Policies. Furthermore, the Plaintiff Policies expressly state that any change in
 9 policy cost factors, which includes changes in cost of insurance rates, can “never
 10 result in an interest crediting rate that is lower than” the guaranteed minimum
 11 crediting rate.

12 29. Accordingly, among many other things, under the plain terms of the
 13 Plaintiff Policies, any change in the cost of insurance rates (a) can only be “based
 14 on [AXA’s] reasonable assumptions as to expenses, mortality, policy and contract
 15 claims, taxes, investment income, and lapses”; and (b) must be “equitable to all
 16 policyholders of a given class”; and (c) cannot result in a crediting rate lower than
 17 the guaranteed minimum crediting rate.

18 **B. AXA Raises Cost of Insurance Rates Solely on the Discriminated**
 19 **Group’s Policies**

20 30. In October 2015, AXA began notifying the Discriminated Group that it
 21 was raising the cost of insurance rates on their AUL II Policies, including the
 22 Plaintiff Policies (the “Notice Letters”). The Notice Letters stated that AXA was
 23 “adjusting your universal life insurance policy in a way that will increase the
 24 monthly cost-of-insurance (COI) deductions from your policy and which is likely to
 25 require payment of additional premium to help ensure that your policy will perform
 26 as previously illustrated.” The Notice Letters further stated that AXA has
 27 “reviewed our mortality and investment income expectations for Athena Universal
 28 Life II policies and [has] determined that they are less favorable than was

1 anticipated when the current schedule of COI rates was established,” which is
 2 consistent with other statements AXA had made publicly regarding the purported
 3 bases for the rate increase.¹⁰

4 31. The Notice Letters did not tell Plaintiffs how much the rate increase
 5 would be or explain how its mortality and investment income assumptions had
 6 changed. Nor did they say what policies or policyholders were subject to a rate
 7 increase. The range of the increase in cost of insurance rate was later calculated to
 8 be between approximately 35 percent to as high as 65 percent.

9 32. In addition to the Notice Letters, a “Frequently Asked Questions”
 10 (“FAQ”) document that AXA released to brokers and agents disclosed that the COI
 11 rate increase was targeted solely at the Discriminated Group.¹¹ Although the FAQ
 12 stated that “the impact of changes in our future mortality and investment income
 13 expectations was most pronounced for th[is] class of policies,” AXA did not
 14 explain how or why its changes were “most pronounced” for this group of
 15 policies.¹²

16 33. To date, AXA has not advised the public, and upon information and
 17 belief, nor any of its policyholders the reasons for the cost of insurance increases.

18 34. On February 10, 2017, counsel for Plaintiffs made an inquiry to the
 19 California Department of Insurance into AXA’s cost of insurance increases, but
 20 Plaintiffs have yet to receive a substantive response. Because no one but AXA and
 21 its regulators have this information, AXA’s refusal to provide the information has
 22 prevented policyholders like Plaintiffs from verifying the accuracy of AXA’s
 23 representations that its rate increase is justified by changes in assumptions as to
 24 mortality and investment income. It is likely for this reason that NYDFS proposes

25 _____
 26 ¹⁰ See also AXA Equitable Life Ins. Co., Quarterly Report (Form 10-Q) 15, 77 (Nov. 11, 2016);
 27 *FAQs: Athena Universal Life II COI Rate Change* at 2, available at
 28 <http://premierbrokerage.com/wp-content/uploads/AXA-COI-Increase.pdf> (last visited Apr. 7,
 2017).

¹¹ *FAQs: Athena Universal Life II COI Rate Change*, *supra* note 11, at 2.

¹² *Id.*

1 its new regulation, which would require life insurance companies like AXA to
 2 notify NYDFS and policyholders in advance of any adverse change in the non-
 3 guaranteed elements of an in-force life insurance policy and would mandate
 4 regulatory review of the anticipated experience factors, such as mortality and
 5 investment income.

6 35. Regardless, it is apparent that AXA's rate increase breaches the terms
 7 of the Plaintiff Policies in at least four ways. **First**, the rate increase is not
 8 "equitable to all policyholders of a given class." **Second**, the rate increase is not
 9 "based on reasonable assumptions as to expenses, mortality, policy and contract
 10 claims, taxes, investment income, and lapses." Rather, Plaintiffs are informed and
 11 believe, and on that basis allege, that in raising COI rates, AXA considered factors
 12 that AXA cannot consider under the Plaintiff Policies. **Third**, the rate increase
 13 impermissibly attempts to circumvent the minimum guaranteed crediting rate under
 14 the Plaintiff Policies. **Fourth**, the rate increase breaches the implied covenant of
 15 good faith and fair dealing that exists in every insurance contract.

16 **C. The Rate Increase Is Not Equitable to All Policyholders in a Class**

17 36. The only "class" referred to in the Plaintiff Policies is the "Rating
 18 Class" or the "class of risk." In the AUL II Product Guide, which AXA distributed
 19 to its sales force, AXA refers to Rating Classes as "Underwriting Classes," but they
 20 appear to refer to the same grouping of policies. A copy of the AUL II Product
 21 Guide is attached hereto as **Exhibit 3**.

22 37. The Underwriting Classes are (i) Preferred Plus Non-Tobacco User;
 23 (ii) Preferred Non-Tobacco User; (iii) Preferred Tobacco User; (iv) Standard Non-
 24 Tobacco User; (v) Standard Tobacco User; and (vi) Substandard letter rating classes
 25 C, D, E, and F, Non-Tobacco and Tobacco User. These classes represent a range of
 26 mortality risks, with Preferred Plus representing the lowest mortality risk to AXA.

27 38. Issue age and face amount are not characteristics of the Rating or
 28 Underwriting Class, although only certain issue ages qualify for a particular

1 Underwriting Class. For example, Preferred Plus is limited only to issue ages of 18
2 to 80, while Preferred is available to anyone from age 0 to 85. Thus, the Preferred
3 and Preferred Plus Underwriting Classes consist of policies with issue ages 70 and
4 above as well as AUL II Policies with issue ages 69 and below. These Underwriting
5 Classes also consist of AUL II Policies with face amounts of \$1 million and above
6 as well as AUL II Policies with face amounts of \$999,999 and below.

7 39. AXA's rate increase violates the provision that any change in cost of
8 insurance rates be equitable to all policyholders within a class because the rate
9 increase applies only to some, rather than all, members of an Underwriting Class
10 (those with issue ages of 70 and above and face amounts of \$1 million and above).
11 For example, some members of the Preferred and Preferred Plus rating classes
12 received a cost of insurance rate increase while others did not. The same holds true
13 for every other Rating or Underwriting Class.

14 40. There also is no equitable or actuarial basis for singling out policies
15 with issue ages of 70 and above and face amounts of \$1 million and above. This is
16 particularly true with respect to the alleged adverse changes in AXA's investment
17 income expectations. If, as AXA contends, it expects to receive less investment
18 income due to lower interest rates, it would expect to receive less investment
19 income for all policies regardless of their issue ages or face amounts. Indeed,
20 interest rates would have a greater impact on policies with **lower** issue ages, not
21 **higher** issue ages, because AXA would expect to realize the shortfall in expected
22 investment income over the course of many more years for policies with lower
23 issue ages. Although in a different context, even AXA itself has recognized this
24 generally applicable principle. In the AUL II Product Guide, AXA expressly
25 acknowledges that interest rate assumptions have a greater impact on policies
26 issued to younger insureds (*i.e.*, those whose policies will be longer in duration). It
27 states:

28 Note that interest rates credited on a UL policy are **less**

1 **important** in the sales illustration on a 75-year-old than
 2 they are on a 35-year-old since the illustration generally
 3 shows payments and policy values to age 120, (although
 4 the focus is often on age 100) and compounding over 85
 5 years makes much more of a difference than over 45
 6 years. *Thus, there is relatively less interest rate risk on*
 7 ***Athena II at older ages than at younger ages.***

8 41. Nor does it appear based on A/E ratios that the AUL II Policies have
 9 experienced worse mortality for policies with issue ages of 70 and above and face
 10 amounts of \$1 million and above. The A/E ratio is the actual to expected ratio, and
 11 reflects an insurance company's actual experience compared to its expected
 12 experience. Upon information and belief, AXA's A/E mortality ratios for policies
 13 with issue ages of 70 and above and face amounts of \$1 million and above is **lower**
 14 **than** the A/E mortality ratios for policies with issue ages of 69 and below and face
 15 amounts of \$999,999 and less. In other words, upon information and belief, AXA's
 16 mortality experience for the Discriminated Group has been more favorable than it
 17 has been for AXA's other AUL II Policies, which were not subject to the cost of
 18 insurance rate increase.

19 42. Thus, not only is AXA's rate increase not equitable to all
 20 policyholders within a given class, the rate increase appears to target a group of
 21 policies that have been **more favorable to AXA** than those that did not receive a rate
 22 increase. For this and other reasons, Plaintiffs believe that AXA had other
 23 undisclosed and improper motives for targeting the Discriminated Group for the
 24 rate increase.

25 43. Specifically, Plaintiffs are informed and believe, and on that basis
 26 allege, that AXA identified the Discriminated Group as consisting largely of
 27 investor policyholders that acquired their AUL II Policies in or through the
 28 secondary market for life insurance. Such policyholders, like Plaintiffs, have

generally paid only enough premiums to cover their monthly policy charges and chosen not to invest in the AUL II policy account, which has resulted in less premium revenue for AXA and lower policy account values. The Plaintiff Policies, however, do not permit AXA to raise cost of insurance rates based on policy account values or how much policyholders choose to fund their policies. Indeed, by penalizing policyholders for exercising their contractual right to fund their policies as they choose, AXA has also breached the implied covenant of good faith and fair dealing.

D. The Rate Increase Is Not Justified by Changes in Reasonable Assumptions as to Mortality and Investment Income

44. The Plaintiff Policies state that AXA may base a change in cost of insurance rates only on reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income, and lapses. These are the only six assumptions that AXA may consider, and its assumptions must be reasonable. Furthermore, to be based on AXA's reasonable assumptions, the changes in cost of insurance rates must correspond with the magnitude of the changes in AXA's assumptions.

45. Here, AXA has cited only two assumptions in support of the rate increase—mortality and investment income. Neither of these assumptions, however, supports AXA's rate increase.

Mortality

46. *First*, as to mortality, it is well known in the life insurance industry that over the past decade, mortality has improved, not worsened, and people are living much longer than anticipated several years ago when AXA priced the AUL II Policies. For example, in 2015, the National Center for Health Statistics reported “[s]ignificant decreases in mortality in 2014 compared with 2013” and observed

1 that this year-to-year improvement was “consistent with long-term trends.”¹³
 2 “Although year-to-year changes are usually relatively small,” explained the
 3 National Center for Health Statistics, “the age-adjusted death rate in the United
 4 States decreased 16.6% between 2000 (869.0) and 2014 (724.6).”¹⁴ This “longterm
 5 trend” of improving mortality is also evidenced by the release of several new
 6 mortality tables over the past two decades that would, if anything, support a
 7 decrease in cost of insurance rates, not an increase in rates as high as 68%.

8 47. Specifically, in 2001, the Society of Actuaries’ (“SOA”) and the
 9 American Academy of Actuaries (“AAA”) produced the 2001 Commissioner’s
 10 Standard Ordinary (“CSO”) Table, which replaced the previous 1980 CSO Table to
 11 reflect significant improving mortality, especially at older ages. The maximum cost
 12 of insurance rates allowed under the AUL II Policies, however, are based on the
 13 older 1980 CSO Table, not the newer 2001 CSO Table.¹⁵ The SOA also is currently
 14 investigating an update of the 2001 CSO Table, and a 2015 investigative report by
 15 the SOA showed significant reductions in insurance company reserves compared to
 16 the 2001 CSO Table due to mortality improvements since 2001. In addition, in
 17 2008, just four years after AXA priced the AUL II Policies, the SOA released a
 18 2008 Valuation Basic Table (“VBT”) that reflected significant mortality
 19 improvements compared to prior tables, especially at older ages. In 2014, the SOA
 20 released the 2014 VBT, which showed overall mortality improvement from the
 21 2008 VBT.

22 48. These new mortality tables demonstrate that since AXA originally
 23 priced the AUL II Policies (in or around 2004), mortality has improved, not
 24

25 ¹³ Murphy, *supra* note 1, at 5.

26 ¹⁴ *Id.*

27 ¹⁵ AXA has defended its COI rate increase by claiming that the new rates remain lower than the
 28 maximum rates under the policies. Those maximum rates, however, are based on the outdated
 1980 CSO table and therefore say nothing about whether AXA’s new rates are justified in light of
 its actual mortality experience.

1 worsened, and this change in mortality would support a decrease, not increase, in
2 cost of insurance rates.

3 49. Plaintiffs also are informed and believe, and on that basis allege, that
4 AXA adjusted the cost of insurance rates for universal life insurance at least five
5 times between 2004 and 2013, updating its mortality assumptions as needed, and
6 AXA never disclosed that it had suffered adverse mortality to justify a change in
7 cost of insurance rates on its in-force AUL II Policies. Indeed, upon information
8 and belief, as late as February 25, 2015, AXA represented to NYDFS that its
9 current experience for factors underlying any nonguaranteed elements, including
10 mortality, was not different from its anticipated experience. Yet just seven months
11 later, AXA purported to have discovered adverse mortality experience justifying a
12 cost of insurance rate increase of as much as 68%. It is simply implausible that in
13 just seven months, AXA went from anticipating no changes in mortality to
14 mortality changes justifying a 68% increase in the cost of insurance rates.

15 **Investment Income**

16 50. *Second*, as to investment income, upon information and belief, AXA
17 likewise represented to NYDFS as late as February 25, 2015 that its current
18 experience for factors underlying any nonguaranteed elements, including
19 investment income, was not different from its anticipated experience, and it is
20 highly implausible that AXA only discovered an adverse change in investment
21 income justifying a rate increase of as much as 68% just seven months later when it
22 notified the Discriminated Group it was raising their cost of insurance rates.

23 51. In any event, even if lower interest rates may impact AXA's cost of
24 providing insurance, they would not justify a rate increase as high as 68% because
25 interest rates should be a relatively minor factor in calculating AXA's cost of
26 insurance (and, consequently, its cost of insurance rates).

27 52. To begin with, as it relates to cost of insurance rates, "investment
28 income" can only refer to the investment income that AXA earns (or expects to

1 earn) on its profits from providing insurance, and not on funds in its policyholders'
2 accounts. As mentioned above, a universal life insurance policy consists of two
3 distinct components—(a) the life insurance, or “mortality,” component; and (b) the
4 accumulated value, or “savings,” component. Although a life insurance company
5 may earn investment income from both of these components, it can only consider
6 investment income on the mortality component when determining the cost of
7 insurance. The investment income it earns from investing funds in policyholder
8 accounts (i.e., the savings component), on the other hand, is only relevant to setting
9 the interest rate credited to those accounts, and is not relevant to determining the
10 cost of insurance. This is because the cost of insurance charge is the mortality
11 charge. It is intended to cover the risk of the insured’s death, not the investment
12 income risk associated with policyholder accounts (and guaranteeing policyholders
13 a minimum interest rate on their policy accounts).

14 53. The cost of insurance charge includes an expected profit over the
15 insurance company’s expected mortality. The insurance company then expects to
16 invest this profit and earn investment income on it. The company then factors this
17 profit and the investment on this profit in setting the cost of insurance rates. Lower
18 interest rates may result in lower investment income, but lower rates would not
19 result in a loss unless the insurance company’s investments had a negative return.
20 But this is highly unlikely to occur because most life insurance companies invest
21 primarily in fixed-income securities, such as bonds. Thus, to the extent AXA is
22 raising COI rates because it is earning less investment income on its mortality
23 profits as a result of low interest rates, it is highly unlikely that this lower
24 investment income would justify a rate increase, much less one as high as 68%.

25 54. To illustrate this, assume AXA’s COI rate contemplated a 20%
26 mortality profit. For every \$120 in COI charges received in a year, AXA would
27 expect to pay out \$100 in claims, leaving \$20 to invest. If it assumed it would earn
28 5% on the profit of \$20 in that year, it would expect to earn \$1.00 of investment

1 income. If it now expects to earn 1% instead of 5%, the investment income would
2 drop to \$0.20 instead of \$1.00. But this 80% drop in investment income would not
3 translate to an 80% COI rate increase because it does not capture the \$20 mortality
4 profit. In other words, AXA is earning \$20.20 instead of \$21.00 on the mortality
5 component, which is a difference of less than 4%, assuming mortality is as
6 expected. If AXA experienced favorable mortality, that favorable mortality
7 experience should also offset the cost associated with the lower than expected
8 investment income. Although this is a very rudimentary example, it illustrates how
9 a decline in interest rates is not likely to result in a COI rate increase as high as
10 68%.

11 55. As to the investment income on the savings component of a universal
12 life insurance policy, a life insurance company expects to earn a spread on the funds
13 that policyholders maintain in their policy accounts. That is, if the life insurance
14 company is earning 8% on its investments on policyholder accounts, it may credit
15 policyholders 7% and earn a spread of 1%. If interest rates are low and the
16 company is earning only 5% on its investment on policyholder accounts, it may
17 lower the crediting rate to 4% and still earn a 1% spread. Thus, even if AXA could
18 consider interest rates on the policy account values (which it cannot), this would not
19 justify a COI rate increase, but only a change in the crediting rate.

20 56. However, if AXA expects to earn only 3% on its investments, AXA
21 cannot reduce the crediting rate to 2% because this rate would be below the
22 guaranteed minimum crediting rate. Nor, however, can AXA attempt to offset this
23 loss by raising COI rates. If it could, the cost of insurance would not be a mortality
24 charge, but a way for AXA to guarantee its profitability on the AUL II Policies by
25 transferring to policyholders all risk under the policies, including the crediting rate
26 risk on policy account values. This would render the guaranteed minimum crediting
27 rate meaningless.

57. Furthermore, even if AXA is properly considering only investment income on mortality, to the extent AXA is raising COI rates to achieve its original profit expectations, the rate increase is improper because AXA cannot raise COI rates simply to guarantee itself its original profit expectations. As NYDFS has said, life insurance companies do not have free reign to raise COI rates “simply to boost profits” because profit margin is not an experience factor.¹⁶ Moreover, as discussed above, the impact of lower interest rates can and must be distributed *equitably* among all policyholders and should not be borne by only the Discriminated Group.

58. In light of this, and given the magnitude of AXA’s rate increase, Plaintiffs are informed and believe, and on that basis allege, that AXA did not base its rate increase on permissible factors, but on impermissible factors such as how much policyholders have chosen to fund their policies and AXA’s expected investment income on policy account values. Plaintiffs also are informed and believe, and on that basis allege, that AXA has imposed the rate increase, not because its mortality and investment income experience has been unfavorable enough to require a COI rate increase, but solely to boost its profits. Profit is not a factor that AXA can consider in changing COI rates. Furthermore, using COI rates to guarantee AXA’s original profitability assumptions, and thereby placing its interest in maximizing gains over the rights of policyholders, would constitute a breach of the implied covenant of good faith and fair dealing.

59. In sum, by drastically raising cost of insurance rates only on the Discriminated Group, AXA seeks to force Plaintiffs and other members of the Discriminated Group either to (a) pay exorbitant premiums that AXA knows would no longer justify the ultimate death benefits or (b) lapse or surrender their policies, thereby forfeiting the premiums they have paid over the last decades. AXA, in turn, will make a huge profit—either through higher premium payments or by

¹⁶ Press Release, NYDFS, *supra* note 2.

1 eliminating a large group of policies (through lapses or surrenders) and keeping the
 2 premiums that have been paid to date. Indeed, as noted above, AXA realized an
 3 increase of \$46 million to net earnings in just the first nine months of 2015 alone.

4 **E. The Rate Increase Is an Impermissible Attempt to Circumvent the**
 5 **Guaranteed Minimum Crediting Rate**

6 60. As explained above, under the express terms of the AUL II Policies, a
 7 policyholder has the right to pay just enough premiums to cover the monthly policy
 8 charges. If the policyholder contributes more than needed to cover the monthly
 9 charges, leaving a balance remaining in the policy account, the AUL II Policies
 10 provide that the balance will accrue interest at a rate no lower than the guaranteed
 11 minimum crediting rate. The guaranteed minimum crediting rate provided for under
 12 the Plaintiff Policies is 3 percent.

13 61. Not only do the AUL II Policies state that the crediting rate will never
 14 be lower than the guaranteed minimum, the policy cost factors section also
 15 specifically states that any change in any policy cost factors, which includes cost of
 16 insurance rates, “will never result in an interest crediting rate that is lower than that
 17 guaranteed in the polic[ies.]”

18 62. AXA admits that it based its rate increase on less favorable investment
 19 income expectations. To the extent AXA considered investment income it earns on
 20 funds in policyholder accounts, the rate increase also violates the AUL II Policies’
 21 provision that any change in COI rates will never result in an interest crediting rate
 22 that is lower than that guaranteed in the policies. This is evident because if AXA’s
 23 investment income earned on funds in policyholder accounts did not drop near or
 24 below the guaranteed minimum crediting rate, AXA could simply address the
 25 change in interest rates by lowering the crediting rate on policy accounts. But if
 26 AXA is raising COI rates instead of lowering the crediting rate, this presumably is
 27 because lowering the crediting rate would not be sufficient for AXA—because it is
 28 earning investment income near or below the guaranteed minimum crediting rate

(thus, reducing its originally anticipated spread). By raising COI rates to account for this, however, AXA is trying to do indirectly what it cannot do directly: it is using COI rates to achieve a crediting rate that is lower than the guaranteed minimum crediting rate, which is precisely what the AUL II Policies prohibit when they say that any change in policy cost factors “will never result in an interest crediting rate that is lower than that guaranteed” in the policies.

63. In short, AXA is trying to take the “guarantee” out of the guaranteed minimum crediting rate. By depriving policyholders of the right to the guaranteed minimum crediting rate, AXA has breached not just the express terms of the AUL II Policies, but also the implied covenant of good faith and fair dealing.

COUNT I

(Breach of Contract – Express)

64. Plaintiffs reallege the allegations contained in paragraphs 1 through 63, inclusive, as if set forth fully herein.

65. The Plaintiff Policies are binding and enforceable contracts.

66. Defendant materially breached Plaintiffs’ policies in several respects, including but not limited to the following:

- a. By increasing the cost of insurance rates on a basis that is not equitable to all policyholders in a given class and instead specifically targeting the Discriminatory Group;
- b. By increasing the cost of insurance rates on a basis other than “reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income, and lapses”; and
- c. By imposing excessive cost of insurance rates.

67. Plaintiffs have performed all of their obligations under the Plaintiff Policies, except to the extent that their obligations have been excused by Defendant’s conduct as alleged herein.

68. As a direct and proximate cause of Defendant's material breaches of the Policies, Plaintiffs have been damaged as alleged herein in an amount to be proven at trial, but in any event that exceeds \$75,000, exclusive of interest.

COUNT II

(Implied Covenant of Good Faith and Fair Dealing – Contractual & Tortious Breach)

69. Plaintiffs reallege the allegations contained in paragraphs 1 through 63, inclusive, as if set forth fully herein.

70. The Plaintiff Policies are binding and enforceable contracts.

71. Each of the Plaintiff Policies includes an implied covenant that Defendant will act in good faith and deal fairly with Plaintiffs.

72. Defendant materially breached the Plaintiff Policies in several respects, including but not limited to the following:

- a. By charging excessive cost of insurance rates, thereby denying Plaintiffs the benefit of its actual policy account values;
- b. By increasing the cost of insurance rates on policyholders who exercised their contractual right to pay only enough premiums to cover a policy's monthly charges and, in effect, penalizing policyholders for and deterring policyholders from exercising their contractual rights, thereby frustrating their right to one of the essential benefits of their policies;
- c. By targeting Plaintiffs and the Discriminated Group for the cost of insurance rate increase when there is no reasonable actuarial basis for doing so;
- d. By considering investment income that it earns on policyholder accounts, as opposed to investment income only from its mortality profits, in raising cost of insurance rates;

- e. By increasing COI rates in an attempt to restore AXA's original expected profitability for the AUL II Policies at the policyholders' expense;
- f. By increasing COI Rates in order to circumvent the minimum guaranteed crediting rate under the AUL II Policies;
- g. By attempting to force Plaintiffs and other members of the Discriminated Group either to (a) pay exorbitant premiums that AXA knows would no longer justify the ultimate death benefits or (b) lapse or surrender their policies, thereby forfeiting the premiums they have paid to date; and
- h. Failing to provide any meaningful disclosures about the cost of insurance rate increases, including refusing to provide or make available the documents that Defendant contends support its alleged bases for raising the cost of insurance rates.

73. Plaintiffs have performed all of their obligations under the policies, except to the extent that their obligations have been excused by Defendant's conduct as alleged herein.

74. Defendant's breaches were conscious and deliberate acts, which were designed to and which did unfairly frustrate the agreed common purposes of the Plaintiffs' policies and which disappointed Plaintiffs' reasonable expectations by denying Plaintiffs the benefits of the Plaintiff Policies.

75. As a direct and proximate cause of Defendant's breaches of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged as alleged herein in an amount to be proven at trial, but in any event that exceeds \$75,000, exclusive of interest. Furthermore, AXA's conduct was conscious and deliberate, and constitutes oppression, fraud, or malice, justifying an award of punitive damages.

COUNT III

(Declaratory Relief)

76. Plaintiffs reallege the allegations contained in paragraphs 1 through 63, inclusive, as if set forth fully herein.

77. For reasons including, but not limited to, those stated herein, there exists an actual dispute and controversy between Plaintiffs and Defendant concerning Plaintiffs' rights and Defendant's obligations under the Plaintiff Policies, including but not limited to how Defendant must implement any change in the cost of insurance rates and under what circumstances Defendant may change the cost of insurance rates.

78. Accordingly, Plaintiffs seek a declaration (a) that Defendant's cost of insurance rate increase is improper under the Plaintiff Policies and that any excess premiums received must be returned or the policies' account values recalculated according to the original cost of insurance rates; (b) that Defendant's purported "class" of policies defined by issue age and face amount are improper classes; and (c) setting forth the specific guidelines that govern the factual circumstances under which Defendant can raise the cost of insurance rates.

79. Such a declaration will help prevent or limit any future controversies under the Plaintiff Policies by providing guidance as to when and how Defendant can change the cost of insurance rates on its in-force AUL II Policies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

On the First Count

1. For compensatory damages in an amount to be determined at trial;
2. For an award of pre-judgment and post-judgment interest;
3. For the costs of the suit herein incurred, including reasonable attorneys' fees to the extent permitted by law; and
4. For such other and further relief as the Court may deem proper.

On the Second Count

1. For compensatory damages in an amount to be determined at trial;
2. For punitive damages in an amount to be determined at trial;
3. For an award of pre-judgment and post-judgment interest;
4. For the costs of the suit herein incurred, including reasonable attorneys' fees to the extent permitted by law; and
5. For such other and further relief as the Court may deem proper.

On the Third Count

1. For a declaration (a) that Defendant's cost of insurance rate increase is improper under the Plaintiff Policies and that any excess premiums received must be returned or the policies' account values recalculated according to the original cost of insurance rates; (b) that Defendant's purported "class" of policies defined by issue age and face amount are improper classes; and (c) setting forth the specific guidelines that govern the factual circumstances under which Defendant can raise the cost of insurance rates;
2. For the costs of the suit herein incurred, including reasonable attorneys' fees to the extent permitted by law; and
3. For such other and further relief as the Court may deem proper.

Dated: April 7, 2017

Respectfully submitted,

ARENT FOX LLP

By: /s/ Franjo M. Dolenac
Michael Cryan
Franjo M. Dolenac

Attorneys for Plaintiffs
THE DUFFY 2004 LLC
and THE TULL 2006 LLC

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: April 7, 2017

Respectfully submitted,
ARENT FOX LLP

By: /s/ Franjo M. Dolenac
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